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91-1862

No. 92-

Supreme Court, U.S.
FILED
MAY 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

DAVID GANTT, *et al.*,
Appellants,

v.

DEAN SKELOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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LIST OF PARTIES

Appellants

David Gantt, individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; Saul Weprin, Speaker of the Assembly of the State of New York; the Assembly of the State of New York; Asquith Reid, Morton M. Avigdor, Vivian Bright, Bernard Freilich, Corinna Grant, Laraine A. Grande, Lorrelle Henry, and Luis Osorio, each a voter in the State of New York; and Gary L. Ackerman, Floyd H. Flake, Thomas J. Manton, Major R. Owens, Charles B. Rangel, Charles E. Schumer, and Stephen J. Solarz, each individually as a voter in the State of New York and as a Member of the U.S. House of Representatives.

Appellees

Dean Skelos, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; the New York State Task Force on Demographic Research and Reapportionment; Ralph Marino, Majority Leader of the New York State Senate; Mario Cuomo, Governor of the State of New York; the Senate of the State of New York; Stan Lundine, Lieutenant Governor of the State of New York; the Board of Elections of the State of New York; Puerto Rican Legal Defense and Education Fund, Inc.; Evelyn Corchardo and Michael T. Waring.

QUESTIONS PRESENTED

Under the Anti-Injunction Act, 28 U.S.C. § 2283, was it error for the court below to enjoin a state court from adjudicating an apportionment case involving congressional district lines on the ground that the injunction was "in aid of" the federal court's jurisdiction to adjudicate the same dispute?

Under the principles of federalism reflected in this Court's decisions in *Scott* v. *Germano*, 381 U.S. 407 (1965), and *Younger* v. *Harris*, 401 U.S. 37 (1971), was it error for the court below to decline to abstain from exercising jurisdiction to adjudicate an apportionment dispute over congressional district lines when a state court had already asserted jurisdiction to adjudicate the same dispute, and is ready, willing, and able to do so?

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

This is an appeal from an order of a three-judge federal court, dated and entered May 5, 1992, enjoining all parties and counsel from proceeding in the action entitled *Reid, et al.* v. *Marino, et al.*, No. 9567/92, pending in the Supreme Court of the State of New York for the County of Kings (the "State Court Action").

The three-judge federal court—which was no further along than the State Court in adjudicating the apportionment dispute—summarily restrained the prior pending State Court Action without mention of or regard to the Anti-Injunction Act, 28 U.S.C. § 2283, and in derogation of this Court's express instructions that federal courts should defer to state courts in apportionment matters.

The lower court's injunction thus conflicts directly with this Court's ruling in *Cotlow* v. *Emison*, 112 S. Ct. 855 (1992), in which this Court unanimously and summarily vacated an identical injunction. In *Cotlow*, as here, a prior state court action challenged the State's existing congressional apportionment. There, as here, a later federal action was filed seeking the same relief. There, as here, parties moved before the three-judge court to enjoin the state court action. There, as here, the federal court granted the injunction. There, this Court promptly lifted the order without dissent. The Court should do the same here.

The action in which the court below issued the injunction is brand new. The pleading here seeks exactly the same relief—a court-devised redistricting plan for New York's congressional districts—as the action in New York Supreme Court. There are no judgments or orders in either case adjudging the merits. Both courts have issued comparable scheduling orders. On the day the injunction issued, acting more expeditiously than the federal court was prepared to proceed, the New York Supreme Court appointed special masters or "referees" to devise an apportionment plan.

In short, at the time the injunction issued last week, parallel cases were pending in federal and state court, both seeking the same relief and in essentially the same posture. On that basis alone, the federal court ruled that "this dispute *must* be decided in one forum" (emphasis in original) and that, consequently, the New York Supreme Court action must be enjoined. App. 8a.

This was plain error. The Anti-Injunction Act expressly forbids an injunction against state court proceedings unless one of three narrow exceptions apply. Two of those exceptions—when expressly authorized by Congress or when necessary to effectuate or protect a judgment—are plainly inapplicable here. The third exception on which the court below relied—permitting an injunction when necessary in aid of the federal court's jurisdiction—does not authorize a federal court to abort a state action simply because the state case is a parallel *in personam* action seeking comparable relief.

The injunction issued below is a stake in the heart of federalism; that the order enjoins an apportionment case deepens the wound. The federal proceeding, like the State Court Action it restrains, is a suit against only New York State agencies and New York State officials involving the apportionment for the election in New York State of representatives from New York State to the U.S. Congress. Article I, section 4, of the U.S. Constitution expressly reposes the task of apportioning congressional districts in the States, not the federal government. The Supreme Court of the State of New York has the exact same duty as the federal court—and, we respectfully submit, the primary right—to apply federal and State constitutional principles to the task of apportionment. For a federal court to decide for itself that such a matter of acute State interest must be addressed only in a federal court disregards the comity and deference that this Court has repeatedly instructed the lower federal courts to observe toward state courts.

The injunction should be vacated.

OPINION BELOW

The Memorandum and Order of May 5, 1992, issued by the three-judge federal court in *Puerto Rican Legal Defense and Education Fund, Inc.* v. *David Gantt, et al.*, 92 CV 1521 (SJ) and *Waring* v. *David Gantt, et al.*, 92 CV 1776 (SJ), and filed in the United States District Court for the Eastern District of New York, has not been reported. It is reprinted in the Appendix at App. 1a-10a.

JURISDICTION

The Order appealed from was entered May 5, 1992. An application for an order staying that portion of the Order enjoining the State Court Action pending appeal to this Court was heard and denied on May 6, 1992. App. 14a-15a.

A notice of appeal to this Court was timely filed on May 6, 1992. App. 16a-23a. On May 13, 1992, this Court entered an order staying the injunction below pending this appeal.

The jurisdiction of this Court to review the three-judge court's order is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, article I, section 4, provides:

> The Times, Places and Manners of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreement to the usages and principles of law.

28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

The Parties

Appellants here fall into two groups.

One consists of the plaintiffs in the State Court Action. None of these appellants is a party in the federal court action. Still, the federal court order expressly enjoins them from proceeding in the State Court Action. App. 8a.

The other group of appellants consists of certain defendants in the federal court action. These are the Assembly of the State of New York; the Speaker of the Assembly, Saul Weprin; and Assemblyman David Gantt, who is co-chair of the New York State Legislative Task Force on Demographic Research and Reapportionment. The Assembly and its Speaker are also defendants in the State Court Action.

Appellees also fall into two groups.

One group of appellees consists of certain defendants in the federal court proceeding. These are the New York Senate; its majority leader (Ralph Marino); the Legislative Task Force on Demographic Research and Reapportionment and one of its co-chairs (Dean Skelos); and the Governor and Lieutenant Governor of the State (respectively, Mario M. Cuomo and Stan Lundine). Of these, all but the Legislative Task Force and its co-chair, Mr. Skelos, are parties defendant in the State Court Action.

The other group is plaintiffs in the federal court action: the Puerto Rican Legal Defense and Education Fund, Inc., and two individuals who are alleged to be residents of and voters in New York State.

The Apportionment Dispute

Based on the 1990 Census figures, New York State lost three of its thirty-four congressional districts; the State was allocated thirty-one of the 435 voting seats in the Congress to convene in January 1993. This loss of three seats means that New York must redraw its congressional district lines before the 1992 elections.

Under New York law, the New York State Legislature is charged with the responsibility for redrawing congressional districts. N.Y. State Law § 111 (McKinney 1984). The election calendar dictates when this must be done. Under the existing legislative timetable, to compete in party primaries scheduled for September 15, 1992, candidates for Congress must begin to circulate designating petitions by June 9. This means that, in advance of June 9, the new congressional lines must have already been subjected to administrative or judicial review under the Voting Rights Act, which requires preclearance of the lines affecting three of the five counties or "boroughs" in New York City.

Despite this timetable, the Legislature has failed to adopt an apportionment plan. The partisan division between the two houses of the Legislature has complicated efforts at agreement. On March 24, 1992, a leader of the apportionment effort in the Legislature declared an impasse.

The State Court Action

Less than forty-eight hours later, on March 26, 1992, eight individuals who are residents of and voters in Kings County, New York, plus seven incumbent Members of the U.S. House of Representatives commenced the State Court Action in the Supreme Court of the State of New York, County of Kings. The plaintiffs in the State Court Action promptly moved by order to show cause for an order requiring the Legislature to enact a congressional apportionment plan and providing, if the Legislature failed to act, for

proposed plans to be submitted to the State Court by May 1, 1992. The State Court set April 8, 1992 for a hearing on the motion.

The April 8 hearing did not take place as planned. On April 7, 1992, four of the ten defendants in the State Court Action filed a notice removing the State Court Action to federal court. That filing automatically precluded the State Court from proceeding any further with the State Court Action.

The removal notice lacked consent of all the defendants, as required by 28 U.S.C. § 1446. Accordingly, on April 17, 1992, the federal court granted the State Court plaintiffs' motion to remand the State Court Action.

Upon remand, the New York Supreme Court asserted the State Court's jurisdiction to adjudicate the controversy, and entered an order enabling the State Court to proceed expeditiously to the merits.[1/]

By May 4, 1992, the deadline the State Court established for legislative action, the Legislature had failed to act. On that day, the State Court held a hearing to receive proposed plans in evidence. The next day, May 5, 1992, the State Court issued an order stating its view of this Court's preference in apportionment cases:

[1/] The order provided:

A. On or before May 4, 1992, defendants must enact a 31-district Congressional redistricting plan that complies with Article I, Section 2 of the United States Constitution and Article I, Section 11 of the New York State Constitution.

B. If defendants do not enact such a plan by May 4, 1992, then, on that date, plaintiffs and defendants are to submit proposed congressional redistricting plans, and accompanying supporting documents, for the purpose of assisting the court in devising a plan of reapportionment for use in the 1992 elections.

C. On May 4, 1992, the parties are to submit to the court the names of proposed expert witnesses, and all interested parties are to submit up to three names of proposed independent experts, and the qualifications of those experts, for purposes of the court's appointment of three referees to assist the court in formulating a reapportionment plan.

> While both the federal judiciary and the New York State Supreme Court may have concurrent jurisdiction to act in this matter, the United States Supreme Court has indicated on several occasions their preference that the state court exercise jurisdiction over reapportionment. . . . [T]his court. . . will retain jurisdiction until a final congressional redistricting plan has been enacted by the New York State Legislature and signed by the Governor or a plan has been adopted by this court. . . .

App. 10a.

In this same May 5 order, the State Court appointed three referees to assist the State Court in formulating a congressional apportionment plan.[2/] The State Court instructed the referees to hold hearings as soon as possible and to prepare "a written report containing a complete and valid reapportionment plan for the Congressional Districts of the State of New York on or before May 26, 1992." App. 11a.

The Federal Case

Five days after the State Court Action began, on March 31, 1992, certain appellees commenced this action, styled *Puerto Rican Legal Defense and Educational Fund, Inc.* v. *David Gantt, et al.*, 92 CV 1521 (SJ), in the United States District Court for the Eastern District of New York. In an order to show cause signed on April 1, 1992, the federal court set for hearing on April 7—the day before the scheduled State Court hearing— plaintiffs' application for an order providing a timetable for a court-devised plan. At the

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[2/] The State Court's appointees were the Hon. Milton Mollen, a former Presiding Justice of the Appellate Division, Second Department of the New York Supreme Court, and a former Deputy Mayor of New York City; Hon. Vincent Delorio, a retired New York Court of Claims Judge; and Philip Roache, a professor of law at St. John's University. On May 13, 1992, upon notice of this Court's order staying the injunction below pending appeal, the State Court issued a revised order replacing Judge Mollen with Hon. Frank J. Macchiarola, dean of the Cardozo Law School.

April 7 hearing, the three-judge court (Pratt, C.J., Martin, D.J., and Johnson, D.J.) entered an order directing the parties to submit plans by April 27, and allowing other interested parties to do so by May 4. This schedule did not contemplate action on an apportionment plan any sooner than the schedule in the State Court Action.

Lagging well behind was a second federal case—*Waring* v. *Gantt*, No. 92-CV-6134-T—which a lone voter commenced in the United States District Court for the Western District of New York on the same day as the State Court Action began. Various of the defendants in *Waring* were never served with a summons and complaint; none of the parties there (many of the same as in this action and the State Court Action) made any effort to seek preliminary relief or otherwise move that case along; indeed the first action taken in that case was the court's *sua sponte* decision there to transfer the action to the three-judge court below on April 9—well after proceedings in the State Court were underway. The two federal actions were thereafter consolidated.

The Injunction Ruling Below

On May 5, 1992—the same day the State Court appointed its referees to devise a congressional apportionment plan for the State—the court below held a status conference to set a timetable for further proceedings. At this hearing, the court announced its intention to delay one more week, to May 12, before appointing a special master or expert to compose a plan. The court said that, if the Legislature did not act by then, the court would direct a master or expert to devise a plan by May 26—the same day the State Court's order provides for completion of its referees' plan.

Also on May 5, the court below announced its decisions to deny the appellant Assembly's motion to abstain in favor of the State Court Action, and granted appellee State Senate's motion to

enjoin the State Court Action.[3/] The court said that, because only one congressional redistricting plan for New York State was needed, it would be "wasteful, unnecessarily confusing, and inefficient" to resolve the issues in more than one forum. App. 4a. Treating the abstention question as one arising under *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and this Court's treatment of the *Pullman* doctrine in *Harman* v. *Forssenius*, 380 U.S. 528 (1965), the court held that abstention was inappropriate because this federal action involved "no disputed questions of state law." App. 7a.

Having decided not to abstain, the court below then concluded that it had no choice but to enjoin the State Court Action. The entirety of the lower court's reasoning was as follows:

> That said [that abstention is not warranted], and in light of the further reality that this dispute *must* be decided in one forum, we conclude that we must also exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases—[the two federal cases, now consolidated, plus the State Court Action]—are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. *United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). The All

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[3/] Not all the parties in the federal court action joined in or opposed these motions. Of the defendants below, appellees the Governor, Lieutenant Governor and the State Board of Elections took no position on either motion. As for the plaintiffs, only appellee Puerto Rican Legal Defense and Education Fund, Inc. opposed the motion to abstain and joined in the motion to enjoin the State Court Action.

> Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. *Id.*

App. 8a-9a.

On May 6, 1992, the court below denied appellants' motion for a stay of the injunction pending appeal to this Court. App. 14a-15a.

On May 12, 1992, the Legislature still having failed to act, the federal court named the Hon. Frederick B. Lacey, a former federal judge from New Jersey, as a special master to redraw New York's congressional district lines.

On May 13, 1992, on a reference from Justice Thomas of appellants' application for a stay of the injunction below pending appeal, this Court entered an order staying the portion of the lower court's order that enjoined the parties and counsel from proceeding in the State Court Action.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE ANTI-INJUNCTION ACT PROHIBITS THE INJUNCTION BELOW

A. The All Writs Act Is No Basis for the Injunction Below

The court below based its stay of all state court proceedings on the All Writs Act, 28 U.S.C. § 1651(a). App. 7a-8a. That Act, however, cannot justify the injunction.

The powers conferred on federal courts by the All Writs Act do not exceed the limits imposed on federal courts by the Anti-Injunction Act, 28 U.S.C. § 2283. The All Writs Act itself provides that any federal court injunction must be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Thus, the phrase "in aid of...jurisdictions" in the All Writs Act, does not

create a general restraining power in the federal courts free of the limitations of the Anti-Injunction Act.

The lower court's injunction here cannot fit within the "in aid of jurisdiction" exception to the Anti-Injunction Act. There was no need for injunctive relief to protect the federal court's jurisdiction from the state court's concurrent jurisdiction.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Anti-Injunction Act reflects the strong policies of comity and federalism, according to which state court proceedings "'should normally be allowed to continued unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,'" *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970)). The Act does not convey "'a broad general policy for appropriate *ad hoc* application,'" but rather is "a clear-cut prohibition qualified only by specifically defined exceptions.'" *Atlantic Coast Line*, 398 U.S. at 287 (quoting *Amalgamated Clothing Workers* v. *Richman Bros Co.*, 348 U.S. 511, 515-16 (1955)).

The mere existence of two parallel *in personam* actions in state and federal court—involving nothing more than concurrent jurisdiction, overlapping issues and the possibility of inconsistent results—is not among those exceptions. Of particular importance here, that a state court may be simultaneously adjudicating an issue presented to a federal court does not mean that an injunction against the state proceeding is "necessary in aid of" the federal court's jurisdiction. The leading treatise on federal jurisdiction aptly summarizes the point:

> A litigant may bring parallel, even duplicative actions in federal and state court; the general rule is that where state and federal courts have concurrent jurisdiction over a case, neither court may prevent the parties from simultaneously pursuing claims in both courts. Moreover, it is now well established that the mere existence of a parallel action in state court does not rise to the level of interference necessary to permit injunctive relief under the "necessary in aid of jurisdiction" exception.

1A *Moore's Federal Practice*, § 0.211 at 2351 (1991).

Atlantic Coast Line, *supra*, so demonstrates. There, a federal court had held that the Norris-LaGuardia Act prohibited an injunction barring a labor union from picketing a railroad yard. Unhappy with the result, the railroad brought an action in state court and obtained an injunction. The federal court then enjoined the state court proceeding, reasoning that the Anti-Injunction Act's "in aid of jurisdiction" exception applied. In reversing the injunction, this Court held that, notwithstanding the inconsistent results, the "in aid of jurisdiction" exception could not be used to block the state action, because "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. at 295.

The reasoning in *Atlantic Coast Line* echoed this Court's earlier ruling in *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922), which Justice (now Chief Justice) Rehnquist quoted with approval in the plurality opinion in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977):

> [A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and

> pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . ..

260 U.S. at 230 (emphasis added).

Indeed, the only circumstance in which this Court has explicitly upheld reliance upon the "in aid of jurisdiction" exception to the Anti-Injunction Act or its antecedents is the situation for which the exception was plainly intended: when, in an *in rem* action in federal court, a state court proceeding threatens to deprive the federal court of control over the *res*. *See, e.g., Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935) (injunction necessary to protect federal court's ability to control and dispose of property in liquidation proceeding). The lower courts have, on rare occasion, enlarged the exception to include certain extraordinary *in personam* actions. Each of these unusual cases, however, has involved, at the time the injunction issued, a pre-existing order adjudging the merits in a mature federal action, the efficacy of which a subsequent state court suit directly imperiled. None has involved two parallel actions moving at the same or comparable pace in which neither court had reached a ruling on the merits.[4/]

[4/] *See, e.g., United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 280 (2d Cir. 1990) (injunction to protect federal court judgment); *Battle* v. *Liberty National Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (injunction proper to protect settlements entered in first-filed class actions, "involving years of litigation and mountains of paperwork," against state court action filed years later); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985) (upholding injunction against state court action, not yet begun, to protect ability of federal court to manage and settle multi-district class actions that had been pending for years); *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (injunction requiring removal of state court proceeding that would have eviscerated existing federal consent decree); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383 (4th Cir. 1974) (injunction against state court interference with federal court's ability to monitor compliance with federal court school desegregation case); *Skolnick* v. *State Electoral Bd. of Illinois*, 336 F. Supp. 839 (N.D. Ill. 1971) (three-judge court) (injunction issued to prevent parties

(continued...)

The injunction below flies in the face of the Anti-Injunction Act and the principles of federalism that underpin that statute. The federal court here did not find that the State Court Action imperiled a pre-existing federal order on the merits of the apportionment dispute. Nor did the federal court find that the State Court would somehow impede the apportionment process, or was incapable of adjudicating the dispute. The court simply made a "practical" decision that only one court ought to pass on apportionment and then, noting that federal law and federal offices were in issue, cho itself to be that forum.

That is not a choice that a federal court is free to make. The lower court's suggestion that the federal court could move more swiftly than the New York State Supreme Court is untenable, and in any event no basis for the injunction. The lower court noted that, whereas its judgment would be directly appealable to this Court, the State Court's judgment would be subject to further state appeals. The court failed to note, however, that New York's appellate courts provide for expedited appeals and are keenly experienced in doing so in election law cases in a matter, not of days or weeks, but a few hours. Even were that not so, the Anti-Injunction Act does not authorize an injunction based on a federal court's guess about the likely timing of a state court proceeding.

The injunction below is irreconcilable with this Court's unanimous decision vacating an identical injunction in *Cotlow* v. *Emison*, 112 S.Ct. 855 (1992). That case mirrors this one in all relevant respects; the litigations involved were parallel federal and state actions to reapportion congressional districts. Like the State Court Action here, the state action there was commenced first. There, both actions proceeded on parallel tracks until the state court announced that it had devised a state-legislative reapportionment plan. The three-judge court empaneled to hear the federal case then enjoined further proceedings in the state court action. In vacating

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[4/](...continued)
from seeking a state court order modifying an apportionment plan that the federal court had already adopted).

that injunction without opinion, the Court set aside a lower court opinion that adopted the same rationale for an injunction adopted below. *See Emison* v. *Growe*, Civil #4-91-202 (D. Minn. Dec. 5, 1991).[5/]

The court below tried unsuccessfully to distinguish *Cotlow* on the ground that there, unlike here, an injunction was improper because the state court there was "on the eve of issuing final judgment." App. 7a. Yet on the lower court's reasoning here, that should have been all the more reason for justifying an injunction in *Cotlow*. Animating the injunction below was the concern that the State Court would enter a final judgment redrawing congressional district lines. The putative peril the court perceived from the State Court Action here was not that the State Court would do nothing but that the State Court would do its job to adopt a plan. It was precisely such a judgment that the court below saw as a threat to its jurisdiction. And it was precisely the threat of such a judgment that this Court deemed in *Cotlow* to be an insufficient ground to circumvent the Anti-Injunction Act.

B. The Pendency of a Voting Rights Act Claim Cannot Justify the Injunction Below

The lower court mistakenly concluded that the mere inconvenience or inefficiency of parallel proceedings in state and federal court triggers an exception to the Anti-Injunction Act because the pending federal case raises issues under the federal Voting Rights Act. App. 7a, 9a. But the Voting Rights Act claim provides no basis for the lower court's injunction.

[5/] Undaunted by this Court's reversal of its injunction, the three-judge panel in Minnesota refused to abstain and, on February 19, 1992, adopted a competing legislative redistricting plan, as well as a congressional districting plan, which the state court had not yet reached. *Emison* v. *Growe*, 782 F. Supp. 427 (D. Minn. Feb. 19, 1992). The federal court's failure to abstain there has been challenged, and this Court has granted certiorari. *Growe* v. *Emison*, 60 U.S.L.W. 3673 (Mar. 30, 1992).

First: That a state court proceeding may implicate federal statutory rights is not among the three explicit exceptions to the Anti-Injunction Act's absolute prohibition on injunctions against state court proceedings. As this Court held in *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1971), "a federal court does not have the inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. Any other result would create an exception to the Anti-Injunction Act *whenever* a state court exercised concurrent jurisdiction over a matter arising under federal law, which would eviscerate the Anti-Injunction Act.

Second: The Voting Rights Act claim below is either stale or premature. As pleaded, the claim is that New York's *existing* congressional district lines violate the Voting Rights Act. But that claim is an anachronism: no one asserts that New York may employ its existing 34 congressional district lines to hold an election to fill the 31 seats now allotted to New York; everyone concedes that new lines are essential. Thus, the pleaded Voting Rights Act claim is a non-issue. And to the extent that the claim can be read to apprehend that newly-drawn lines may violate the Voting Rights Act, the claim is premature: no basis exists to suppose that newly-drawn lines will not fully comply with all applicable laws, including the Voting Rights Act.

Third: That no basis exists to assume non-compliance with the Voting Rights Act is true whether the lines are drawn in the court below or in the State Court Action. The state courts have concurrent jurisdiction to consider Voting Rights Act claims. *See Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982); *see also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (concurrent state court jurisdiction presumed absent explicit contrary congressional directive or state court disability to adjudicate). It follows that the New York Supreme Court is fully able to consider Voting Rights Act concerns in adjudicating this apportionment dispute. And the State Court has every incentive to do so: it

is nonsense to presume that the State Court would entertain a plan that would violate federal law.

Fourth: The proceedings in the State Court Action to date prove it. Every one of the plans submitted in that Action to date contains—and every party in the Action concedes the need for— the relief pleaded in the Voting Rights Act claim in the federal proceeding below: namely, that to comply with the Voting Rights Act any reapportionment plan must provide for at least two districts in New York City in which Latino voters hold an effective voting majority. At its hearing on May 4, 1992, the day before the proceeding was enjoined, the State Court expressly acknowledged the Voting Rights Act as an issue of concern. No basis exists—none at all—to suppose that the State Court will be any less attentive to that concern than the court below.

In short, the Voting Rights Act claim below did not entitle the lower court to enjoin the State Court Action. The injunction below is instead an assault on the federalist principle that a state court is equally if not better able to adjudicate questions of federal law if and when they arise in a proceeding properly pending before it. Here, the State Court was prepared to do so. It was error for the court below to stop those proceedings.

C. The Existence of a § 1983 Claim Cannot Justify the Injunction Below

The complaint in the action below pleaded claims under the federal civil rights statute, 42 U.S.C. § 1983. Under *Mitchum* v. *Foster*, 407 U.S. 225 (1972), that statute is an Act of Congress that comes within the "expressly authorized" exception to the Anti-Injunction Act. The court below properly did not rely on this provision to issue its injunction, though certain appellees urged the court to do so. It is readily apparent, however, that section 1983 provides no basis for the lower court's injunction.

The "expressly authorized" exception to the Anti-Injunction Act shares an obvious characteristic with the two other narrow and

extraordinary exceptions to the ban on enjoining state court proceedings: the exceptions are intended to permit an injunction in those rare circumstances in which *the state court proceeding itself threatens federal interests*. Just as the exceptions allow an injunction when a state court proceeding imperils the federal court's jurisdiction, so, too, does the Act allow an injunction when Congress has expressly authorized an injunction against a state court proceeding that threatens the interests Congress intended to protect. Thus, section 1983 permits an injunction against a state court proceeding only when that proceeding *itself* threatens the federal constitutional rights protected by section 1983.[9]

Such is not the case here. Here, the alleged deprivation of federal rights stems from the Legislature's failure to reapportion, not from the pendency of the State Court Action. Far from being a peril to federal interests, the State Court Action is instead an effort to enforce and vindicate the very same federal rights, among others, that section 1983 protects. In these circumstances, *Mitchum*'s holding that section 1983 actions are an exception to the Anti-Injunction Act is wholly inapposite. Indeed, were this not so, a federal court could always enjoin a state court from hearing apportionment cases, which by definition always potentially raise claims under section 1983. This Court's unanimous decision

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[9] *See Mitchum* v. *Foster*, 407 U.S. 225 (1972)(federal court could enjoin state court proceeding against bookstore in bookstore owner's § 1983 action alleging that state proceeding to enforce state nuisance law violated his federal constitutional rights); *Miofsky* v. *Superior Court of State of California*, 703 F.2d 332, 334-35 (9th Cir. 1983)(federal court could enjoin discovery proceedings in state tort litigation against doctor if they violated doctor's federal constitutional rights); *White* v. *White*, 731 F.2d 1440, 1442-43 (9th Cir. 1984) (enjoining enforcement of state court divorce judgment against husband's military retirement benefits). *McNeill* v. *New York City Housing Authority*, 719 F. Supp. 233, 256 n.29 (S.D.N.Y. 1989)(enjoining landlords' state housing court eviction proceedings against low income tenants during pendency of their federal proceeding challenging city housing authority's policies). *Cf. Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977)(antitrust laws expressly authorize injunctions against state court proceedings if and only if the state litigation is itself the violation of the antitrust laws to be restrained).

vacating the injunction in *Cotlow* v. *Emison*, 112 S. Ct. 855 (1992), well attests to the fallacy of such a proposition.

II. THE FEDERAL COURT'S INJUNCTION NOT ONLY EXCEEDS ITS AUTHORITY AND VIOLATES PRINCIPLES OF COMITY BUT ALSO CONTRAVENES THIS COURT'S DECISION IN *SCOTT* v. *GERMANO* AND WELL-ESTABLISHED PRINCIPLES OF ABSTENTION

To hold that the injunction below was unauthorized by any exception to the Anti-Injunction Act, this Court need not reach the issue of whether the court below erred in failing to abstain from exercising jurisdiction. Nevertheless, the lower court's failure to defer to the state court action is an independent ground of clear error, for if the court should not have exercised jurisdiction—but deferred to the state court—then the court should not have issued the injunction at issue. The error here is obvious, because the very basis of the court's injunction—the concern that the State Court could and would adjudicate the case—is the reason the court was obliged to abstain.

A. *Scott* v. *Germano* and its Progeny Require that, in Reapportionment Matters, the Federal Court Defer to the State Court

Article I, section 4 of the United States Constitution expressly reposes the task of apportioning congressional districts in the States, *not* the federal government. *Scott* v. *Germano*, 381 U.S. 407 (1965), establishes that it is the state agencies, including the state courts, which have primacy in fashioning redistricting plans. In *Germano*, this Court held that apportionment is a matter for the States, and that, if judicial intervention is necessary, then the federal courts must defer to state courts. In that case, suits were brought in both state and federal court challenging the apportionment of the Illinois State Senate. On January 22, 1965, the federal

district court invalidated the district lines and directed that reapportionment plans be submitted to the court. On February 4, 1965—fourteen days later—the Illinois Supreme Court did the same thing. When the federal district court refused to stay its own proceedings in light of the state court's ruling, a direct appeal was taken to the Supreme Court. This Court reversed, holding:

> We believe that the district court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court, but appropriate actions by the States in such cases has been specifically encouraged.

381 U.S. at 409 (citations omitted).

Germano teaches that, when the *State* legislature fails to carry out its reapportionment responsibility, intrusion by the judiciary into this intensely political and divisive function is better left to the *state* court—even if (contrary to this case) the federal court had the opportunity to act first. Together with its progeny, the case recognizes that reapportionment—even of congressional district lines—is essentially a State concern, involving State officials, State interests, State election processes, and representatives of the State. These authorities reflect as well that the state courts—with judges who swear allegiance to the same Constitution as federal judges—are fully competent to adjudicate any issues of federal constitutional law that the controversy occasions. Accordingly, when, as here, a state court is ready, willing, and able to resolve an apportionment challenge that a federal court has yet to hear, the federal courts have invariably deferred to the state courts to do so, and dismissed or stayed the parallel federal proceeding.[7]

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[7] *See Chapman* v. *Meier*, 420 U.S. 1, 27 (1975) (Court reversed federal court's reapportionment plan for the North Dakota state legislature, holding, among other things, that "reapportionment is primarily the duty and responsibility of the state (continued...)

Members of California Democratic Congressional Delegation v. *Eu*, No. C-91-3383 FMS (N.D. Cal. Mar. 3, 1992), is directly on point. In that case, the Governor of California brought an action in California state court to compel reapportionment, arguing that the legislature was at an impasse. Shortly thereafter, the Democratic members of the California congressional delegation commenced a second action in federal court, seeking essentially the same relief as was brought in the state case. In light of the first-filed state action and "guided" by the principles of *Germano*, the three-judge federal court abstained from proceeding, declined to enjoin the state court action, and dismissed the federal complaint.

This Court's orders staying federal court apportionment orders have consistently reflected these same federalist principles. For example, just last month, this Court, in *Voinovich, et al.* v. *Quilter, et al.*, 112 S. Ct. 1663 (1992), stayed an order of a three-judge federal court in Ohio that had enjoined a redistricting plan passed by the Ohio Redistricting Commission and approved by the Ohio Supreme Court. Likewise, in subsequent proceedings in *Cotlow*, on an application to stay the federal court ruling pending review, Justice Blackmun granted the stay on that portion of the order that conflicted with the state court order, and left undisturbed only the portion relating to matters that the state court had not yet adjudicated.

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[2]/(...continued)
through its legislature or other body, rather than a federal court"); *Bianchi* v. *Griffing*, 393 F.2d 457, 461 (2d Cir. 1968) (first-filed federal action stayed in favor of later-filed state action to invalidate apportionment of Suffolk County Board of Supervisor districts on Fourteenth Amendment grounds, citing *Scott* v. *Germano*); *Members of California Democratic Congressional Delegation* v. *Eu*, No. C-91-3383 FMS (N.D. Cal. Mar. 3, 1992) (three-judge court); *Badham* v. *Eu*, 568 F. Supp. 156, 158 (N.D. Cal. 1983) (federal court abstained in deference to congressional redistricting by state court, noting that "[r]eapportionment, which is carried out by the states, is an area in which state courts are encouraged to require and formulate valid plans"), *aff'd mem.*, 785 F.2d 314 (9th Cir. 1986); *Ince* v. *Rockefeller*, 290 F. Supp. 878 (S.D.N.Y. 1968) (in suit challenging Assembly districts under Fourteenth and Fifteenth Amendments, federal court abstained in favor of first-filed state action).

In light of *Germano* and the line of federal cases that have followed the *Germano* mandate, the injunction was improvidently granted because the lower court should have abstained from this action in deference to the New York State Supreme Court.

B. The Federal Court Should Have Abstained from Interfering with the Pending New York State Proceeding under the *Younger* Doctrine

As first enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971), there is "a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *See Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

This policy has its roots in principles of federalism. It recognizes that federal courts should endeavor to protect federal rights and interests in a way that will not unduly interfere with the legitimate activities of the States. *Younger*, 401 U.S. at 44. Thus, *Younger* requires federal courts to defer to ongoing state court proceedings where the state proceedings implicate important state interests and afford federal plaintiffs an adequate opportunity to raise the constitutional challenges there. *Middlesex*, 457 U.S. at 432.

Younger is fully applicable to state civil proceedings. *Id.* at 432; *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1, 11 (1987) (*Younger* abstention applies "not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard comity between the State and the National Government.")

The instant action requires abstention under *Younger*. The state proceedings implicate important state interests: this case, as we have said, involves a duty the Constitution assigns to the *State* for *State* officials to apportion districts for representatives from the

State using the election processes of the *State*. The New York State Supreme Court has already assumed jurisdiction over the matter and has appointed three referees (from New York) to assist the State Court in formulating a congressional plan. The New York State Supreme Court proceeding fully affords an adequate opportunity for all parties to raise their federal constitutional challenges.

Finally, this action not only is subject to *Younger*, its continuation would be inconsistent with it. The lower court has granted an injunction that "enjoins all counsel and parties in the action . . . now pending in the Supreme Court in the State of New York, County of Kings, from taking any further steps or proceedings in that action." App. 8a. It is hard to imagine a request more at odds with the principles of federalism protected by *Younger* abstention. The *Younger* doctrine "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal to the state courts." *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

C. *Burford* Dictates that Federal Courts Abstain in Matters in which Predominant State Interests are at Stake

In addition to abstention under *Scott* v. *Germano*, and *Younger* v. *Harris*, the court below should have also abstained under the federal abstention doctrine enunciated by this Court in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

In *Burford*, this Court held that where the issues before a federal court involve matters in which the state has a predominant interest *and* where state courts can adequately and expeditiously decide those matters, the federal court should stay its hand, and dismiss the action, out of respect for the independence of state action. *Id.* at 334. In *Burford*, this Court affirmed the district court's judgment dismissing a complaint attacking the validity of an order of the Texas Railroad Commission which had granted petitioner a permit to drill, because the state's regulation of the oil industry involved Texas state policy, because judicial review in the

state courts was adequate and expeditious, and because ultimate review of federal questions by this Court was fully preserved.

This Court's holding in *Burford* has become an established doctrine of abstention by which federal courts refrain from exercising jurisdiction where doing so would involve needless conflict with the administration by a state of its own affairs. *See e.g.*, *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 350 (1951) (injunction of commission order); *Law Enforcement Ins. Co.* v. *Corcoran*, 807 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987) (claims against an insolvent insurer); *Fay* v. *South Colonie Cent. School Dist.*, 802 F.2d 21, 31 (2d Cir. 1986) (matrimonial and family matters); *New York State Ass'n For Retarded Children, Inc.* v. *Carey*, 727 F.2d 240, 245 (2d Cir. 1984) (administration of New York's Medicaid system); *BT Investment Managers, Inc.* v. *Lewis*, 559 F.2d 950, 954 (5th Cir. 1977). The *Burford* doctrine dictates abstention in matters "intimately involved with the [state's] sovereign prerogative" or in matters "close to the political interests of [the] State." *See Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28-29 (1959).

Redistricting squarely involves the type of sensitive state interest and sovereign prerogative contemplated by the *Burford* doctrine of abstention. It is well settled that redistricting is a matter of state policy. *See White* v. *Weiser*, 412 U.S. 783, 795 (1973) ("We hold that a district court should similarly honor state policies in the context of congressional reapportionment").

Here, in light of the sovereign state interests at stake in reapportionment, *Burford* mandates that the court below should have abstained from exercising jurisdiction over matters of New York redistricting because the State Supreme Court is adequately and expeditiously deciding these issues. It follows that the federal court should not have issued an injunction to protect the jurisdiction it should not have exercised in the first place.

D. The Lower Court's Reliance on *Harman* and *Colorado River* Confuses Established Abstention Doctrines

The lower court, relying on *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), held that the federal court should not *abstain* when there are no disputed state law questions and the case involves an alleged "fundamental deprivation." *Harman*, which was decided before *Germano*, is inapposite. In *Harman*, the Court determined that a Virginia statute requiring the payment of a poll tax (or, in the alternative, the filing of a residency certificate) violated the Twenty-Fourth Amendment prohibiting poll taxes. There were *no* ongoing state proceedings; the Court merely declined to abstain pursuant to the abstention doctrine articulated in *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), which contemplates deference to state court proceedings when an issue of state law, which must be decided, is uncertain, and the resolution of that state law issue could eliminate the federal constitutional issue confronting a court. Nor did *Harman* involve redistricting, such that the *Germano* abstention doctrine, encouraging state courts to redistrict, was applicable. Thus, the lower court's use of *Harman* as a court-contrived "fundamental deprivation" abstention doctrine is unsupported by any principle of abstention.

Similarly, the lower court cites *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976) for its "virtually unflagging" obligation to decide claims, and thus not abstain from hearing the redistricting matter in deference to the state court. But *Colorado River* holds that a federal court has a "virtually unflagging" obligation to adjudicate federal claims *only if* no grounds exist to abstain. And even in that circumstance, *Colorado River* contemplates consideration be given to parallel state proceedings. Thus, this Court held that, if none of the abstention doctrines applied, then, based on "principles unrelated to . . . regard for federal-state relations" the federal court must still consider issues of judicial administration in deciding whether to proceed, and may defer to state proceedings in the interests of

judicial administration. *Id.* at 817. Thus, if anything *Colorado River* should have been an additional reason for the court below to abstain.

Finally, neither *Colorado River* nor *Harman* has anything to do with the form of abstention, stemming from *Younger* v. *Harris*, 401 U.S. 37 (1971), which instructs comity toward state courts and is applicable here. As such, the lower court should have abstained—and therefore should never have issued the injunction.

CONCLUSION

For the reasons set forth above, we respectfully request that the order of the court below enjoining all parties and counsel in the State Court Action from taking any further steps or proceedings in that action be vacated forthwith. And we respectfully renew the request made in our application for a stay of the lower court's injunction — that this Court give expedited consideration to our jurisdictional statement and to this appeal.

Dated: New York, New York
May 15, 1992

Respectfully submitted,

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APPENDIX

WP5085DT:DOC01

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO,

Plaintiffs,

- against - CV-92-1521(SJ)

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RAPLH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants.

----------X

MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

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MEMORANDUM AND ORDER OF THREE-JUDGE COURT

CV-92-1776(SJ)

PER CURIAM:

This memorandum and order addresses the following matters: (1) a motion to enjoin, or in the alternative to remove, a state court suit, made by defendants Marino, Skelos, and the New York State Senate ("Senate defendants"); (2) a motion to dismiss, or in the alternative to stay these federal proceedings on abstention grounds, made by defendants Gantt, Task Force, Weprin, and the New York State Assembly ("Assembly defendants"); and (3) a motion to return the *Waring* v. *Gantt* case to the United States District Court for the Western District of New York, made by plaintiff Waring.

For the following reasons, the motion to dismiss or abstain is DENIED, the motion to enjoin the state court proceedings is GRANTED, and the motion to return *Waring* v. *Gantt* to the Western District is DENIED.

I.

All parties agree that New York's congressional elections cannot proceed based on the districts as currently drawn. New York must be redistricted into 31, rather than the current 34, congressional districts in order to comport with the 1990 census. Since the required redistricting eluded compromise through the political processes, this dispute has found its way into court. On March 26, 1992, one of these consolidated actions, *Waring* v. *Gantt*, was filed in the United States District Court for the Western District of New York. That same day, *Reid* v. *Marino*, Index No. 9567/92, was commenced in the New York Supreme Court, Kings County. On March 31, the other of these consolidated actions, *PRLDEF* v. *Gantt*, was filed in the United States District Court for the Eastern District of New York. Three-judge panels were appointed by the Chief Judge of the Second Circuit in both the *PRLDEF* and the *Waring* actions. *Waring* was transferred to this court by the three-judge panel of the United States District Court for the Western District of New York on April 9, 1992; both *Waring* and *PRLDEF* were thereafter consolidated pursuant to Fed.

R. Civ. P. 42(a), because the two actions seek substantially the same relief.

II.

The three pending cases can ultimately result only in a single approved congressional redistricting plan for New York State. Consequently, these issues must be resolved in a single forum; two courts simultaneously attempting to redistrict the state would be wasteful, unnecessarily confusing, and inefficient. On this point, both the Senate defendants and Assembly defendants agree; they disagree, however, as to what forum should move ahead on the problem. The Assembly defendants suggest that we should exercise our discretion to abstain under the principles of *Scott* v. *Germano*, 381 U.S. 407 (1965) (per curiam) and *Younger* v. *Harris*, 401 U.S. 37 (1971), thereby allowing the state court to handle the case. The Senate defendants (joined by PRLDEF), on the other hand, argue against abstention and in favor of enjoining the state court proceedings, citing our power under the All Writs Act, 28 U.S.C. § 1651.

Our task, therefore, is to determine in which court this dispute should proceed, keeping in mind "the importance and immediacy of the problem", *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965), as well as notions of "comity" and "Our Federalism" which underly the "desire to permit state courts to try state cases free from interference by federal courts." *Younger* v. *Harris*, 401 U.S. at 43-44.

III.

We are faced primarily with a practical problem. The congressional primaries are scheduled for September 15, 1992. *See* N.Y. Elec. Law § 8-100(l) (a). Under New York's Election Law, candidates for office must file "designating petitions," which require a specific number of signatures, with the state and local election boards. N.Y. Elec. Law § 6-118. These "designating petitions" must "be filed not earlier than the tenth Monday before,

and not later than the ninth Thursday preceding the primary election." N.Y. Elec. Law § 6-158(1). The "ninth Thursday preceding the primary election" this year is July 16, 1992. Moreover, "(a) signature made earlier than thirty-seven days before the last day to file designating petitions for the primary election shall not be counted," N.Y. Elec. Law § 6-134(6); thus, potential candidates may not start collecting signatures any earlier than June 9, 1992.

Furthermore, since Bronx County, Kings County, and New York County are "covered jurisdictions" under § 4(b) of the Voting Rights Act, *see* 28 C.F.R. § 51.2, any redistricting by the legislative route would be a change affecting voting which must be precleared either by the Attorney General of the United States or by a three-judge court of the United States District Court for the District of Columbia before it has legal force or effect. 28 C.F.R. § 51.9; *Clark* v. *Roemer*, 111 S. Ct. 2096, 2099 (1991). Under 28 C.F.R. § 51.9(a), the U.S. Attorney General has 60 days from submission of the proposed change to interpose an objection to the proposed plan.

Thus, if the U.S. Attorney, General takes the entire 60-day period available to him in approving any proposed redistricting plan, the State of New York will not have new, approved congressional districts in time for the signature-gathering/petitioning process to begin. In simpler terms, time is of the essence.

IV.

Abstention is a discretionary doctrine. *Harman* v. *Forssenius*, 380 U.S. at 537. In deciding whether or not to exercise our discretion, we are informed by the *Harman* Court's discussion of abstention as it relates to Voting Rights Act challenges. In addition to the fact that no disputed question of state law was raised by the case, the Supreme Court found support for the district Court's refusal to abstain

> in the nature of the constitutional deprivation alleged and the probable consequences of abstaining. The District Court was faced with two class actions attacking a statutory scheme allegedly impairing the right to vote in violation of Art. I, § 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments. As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." The right is fundamental "because preservative of all rights." In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

Harman v. *Forssenius*, 380 U.S. at 537 (citations and footnotes omitted).

Here, we are faced with even more compelling reasons not to abstain. As in *Harman*, there are no disputed questions of state law at issue, and the case involves the same fundamental deprivation involved in the *Harman* case — the denial of the constitutional and statutory right to vote in the election of federal congressional representatives. Moreover, this motion comes under more stringent time constraints than did *Harman*: approximately one month before the beginning of the signature-gathering processes mandated by New York law, roughly five months before

the primary election, and six months before the 1992 general elections.

Furthermore, adjudicating this dispute in state court increases the likelihood of delay. A decision by the state supreme court would be appealable to the supreme court's appellate division, then to the New York Court of Appeals, and only then to the United States Supreme Court. Under 28 U.S.C. § 1253, however, any order of this three-judge court which grants or denies injunctive relief would be appealable directly to the United States Supreme Court.

Finally, we note that the recent cases cited by the Assembly defendants, *e.g.*, *Members of the Calif. Democratic Cong. Delegation* v. *Eu*, ____ F. Supp. ____ (N.D. Cal. 1992), are inapposite, primarily because the federal courts that abstained did so in favor of state redistricting processes that had been substantially completed. In Eu, for instance, the California Supreme Court, exercising its original jurisdiction, had already issued a final judgment redistricting the entire state. *See also Cotlow* v. *Emison*, 112 S. Ct. 855 (1992) (vacating order of three-judge district court enjoining state court proceeding's where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law).

"Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote." *Badham* v. *United States Dist. Court for the Northern Dist. of Cal.*, 721 F.2d 170 (9th Cir. 1983). In view of all of these considerations, we deny the motion to abstain in favor of the state proceeding.

V.

That said, and in light of the further reality that this dispute *must* be decided in one forum, we conclude that we must also

exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases — PRLDEF, Warina, and *Reid* — are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. *United States* v. *International Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990). The All Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. *Id.*

Thus, we enjoin all counsel and parties in the action *Reid* v. *Marino*, Index no. 9567/92, now pending in the Supreme Court of the State of New York, County of Kings, from taking any further steps or proceedings in that action. Counsel for the Senate defendants are directed to serve all parties and counsel in the state-court action with copies of this memorandum and order. A courtesy copy should also be delivered to the chambers of the Supreme Court Justice presiding over the state-court action.

VI.

Plaintiff Waring's motion to return the *Waring* v. *Gantt* action to the Western District is denied in all respects.

SO ORDERED.

/s/George C. Pratt
George C. Pratt,
United States Circuit Judge

/s/John S. Martin, Jr.
John S. Martin, Jr.
United States District Judge

/s/Sterling Johnson, Jr.
Sterling Johnson, Jr.
United States District Judge

Dated: New York
May 5, 1992

MEMORANDUM

SUPREME COURT COUNTY

ASQUITH REID, ET AL.,

Plaintiff,

vs.

RALPH J. MARINO, ET AL.,

Defendant.

By Hon. Shaw,

Dated May 5, 1992

Index # 9567/92

The primary responsibility for congressional reapportionment lies with the New York State legislature. It is ony when the legislature — the Senate and/or the Assembly — have abdicated their duty by failing to enact a redistricting plan that the judiciary is called upon to assume this responsibility and to adopt a plan which will render New York's congressional delegation constitutional, that is, by reducing the number of congressional seats from 34 to 31 in accordance with the 1990 census. While both the federal judiciary and the New York State Supreme Court may have concurrent jurisdiction to act in this matter, the United States Supreme Court has indicated on several occasions their preference that the state court exercise jurisdiction over reapportionment. (*See Maryland Committee* v. *Tawes*, 377 U.S. 656 at 674 and *Scott* v. *Germano*, 381 U.S. 407 at 409). Consistent with these cases, this court which has obtained jurisdiction by virtue of the matter before it, will retain jurisdiction until a final congressional redistricting plan has been enacted by the New York State legislature and signed by the Governor or a plan has been adopted by this court and, in either case, has been approved by the Attorney General of the United States or by a U.S. District Court, District of Columbia 3 judge panel.

Pursuant to this exercise of jurisdiction, this court issued an order dated April 24, 1992 which provided that if the New York State Legislature failed to enact a 31 member of redistricting plan by May 4, 1992, the parties were to submit proposed congressional redistricting plans and accompanying supporting documents, the names of proposed expert witnesses and the names of proposed independent experts to serve as referees.

The legislature has failed to enact a Congressional redistricting plan. This Court must ensure that the regularly scheduled November 1992 congressional election is held in conformity with the applicable law, and must therefore adopt a plan which will reduce the number of New York's Congressional Districts from 34 to 31 in a manner which conforms with both state and federal constitutional mandates and the federal Voting Rights Act.

Therefore, pursuant to CPLR 4001, 4201 *et seq.* and 4311 *et seq.*, this court hereby appoints a panel of three referees to hear and report to this court. The panel shall be composed of the following persons:

Hon. Milton Mollen, [nominated by the parties]
Hon. Vincent A. DeIorio [nominated by the parties]
Hon. Philip D. Roache [designated by the court].

These referees shall assist the court in the formulation of a comprehensive reappointment plan and will, as soon as practicable, hold hearings and prepare for submission a written report containing a complete and valid re-apportionment plan for the Congressional Districts of the State of New York on or before May 26, 1992. The referees shall set forth the criteria underlying the plan they recommend for adoption and the reasons for their recommendations. The referees are hereby granted the powers necessary for the performance of their duties to hear and report in conformance with the previously cited sections of the CPLR.

Along with their report, the referee shall submit a statement of their fees and expenses.

A copy of this order shall be served by the clerk of the court upon each designated referee immediately upon the entry of this order.

This constitutes the decision and order of this Court.

ENTER,

/s/James H. Shaw, Jr.
J.S.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO, *Plaintiffs*,	:	DOCKET NO. CV-92-1521(SJ)
- against -	:	
DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RAPLH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, *Defendants*.	:	ORDER

MICHAEL T. WARING, *Plaintiff,*	:	
- against -	:	
DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe, *Defendants.*	:	DOCKET NO. 92CV1776

Johnson, District Judge:

The State Court Plaintiffs' and the Assembly Defendants' application for an order staying, pending appeal to the United States Supreme Court, that portion of the Court's May 5, 1992 Memorandum and Order enjoining all parties in the action of *Reid* v. *Marino*, Index No. 9567/92, now pending in the Supreme Court of the State of New York, County of Kings from taking any further steps or proceedings in that action, is hereby denied.

/s/ Sterling Johnson, Jr.
United States District Judge
(for the three-judge court)

Brooklyn, New York
May 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, ET AL.,	:	
Plaintiffs,	:	92 Civ. 1521 (SJ)
-against-	:	
DAVID GANTT, ET AL.,	:	
Defendants.	:	
MICHAEL T. WARING,	:	
Plaintiff,	:	92 Civ. 1776 (SJ)
-against-	:	
DAVID GANTT, ET AL.,	:	
Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the plaintiffs in the state court action entitled *Reid, et al.* v. *Marino, et al.*, Index No. 9567/92 (Sup. Ct. Kings Co.) (hereafter, the "State Court Action")—Asquith Reid, Morton M. Avigdor, Vivian Bright, Bernard Freilich, Corinna Grant, Laraine A. Grande, Lorrelle Henry, and Luis Osorio, each a voter in the State of New York; and Gary L. Ackerman, Floyd H. Flake, Nita M. Lowey, Thomas J. Manton, Major R. Owens, Charles B. Rangel, Charles E. Schumer, and Stephen J. Solarz, each individually as a voter in the

State of New York and as a Member of the U.S. House of Representatives—and defendants herein The Assembly of the State of New York, Saul Weprin, Speaker of the Assembly of the State of New York, David Gantt, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment, and the Assembly half of the New York State Legislative Task Force on Demographic Research and Reapportionment (hereafter collectively, the "Assembly Defendants"), hereby appeal to the United States Supreme Court from so much of the Memorandum and Order of the Three-Judge Court dated May 5, 1992 as enjoined all parties and counsel in the State Court Action from taking any further steps or proceedings in that action.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
May 6, 1992

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

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CERTIFICATE OF SERVICE

I, Nicole L. Felton, do hereby certify that the foregoing Notice of Appeal to the Supreme Court of the United States was served upon the parties on the attached service list in the manner specified on the attached service list on this 6th day of May 1992.

/s/Nicole L. Felton
Nicole L. Felton, Esq.

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